SUPREME COURT, U. S.

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No. 180

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner,*

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., and the NEW YORK CENTRAL RAILROAD COMPANY, *Respondents.*

REPLY MEMORANDUM FOR PETITIONER

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The principal point repeatedly urged in the Opposition is that two years ago in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook Railroad Co., cert. denied,* 390 U.S. 923, this Court "denied . . . review of an earlier decision of the same issue" presently before the Court. But as the carriers themselves defined the "Question Presented" in that 1967 case (Brief for Respondents Concerning Petition for Writ of Certiorari, p. 2), it was whether upon Award expiration "the modifications in prior agreements and rules governing the employment of firemen which were made by or pursuant to the Award continue to apply . . . or do the prior agreements and rules automatically revive . . ." In contrast to that issue, the present different question concerning post-Award carrier action forcing re-

maining firemen into inferior jobs was not litigated, passed upon by the lower court, or urged upon this Court for review in the earlier case.

Clearest refutation of the carriers' claim that the present issue was previously decided by the Court of Appeals' 1967 ruling comes from that Court itself. In the present case the carriers urged upon the Court of Appeals below, as they urge here, that its 1967 decision authorized them to abolish jobs after the Award expired so as to force men into lower paying assignments; far from accepting that *res judicata* contention the opinion below (see Petition, p. 39) commences by stating:

> "This case involves another aspect of the railroad work rules litigation. It concerns a supplemental issue that arose in the District Court in ancillary proceedings after issuance of the judgment that was reviewed by this Court in *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R.R. Co.*, 128 U.S. App. D.C. 59, 385 F. 2d 581 (1967) *cert. denied*, 390 U.S. 923 (1968)."

Apart from the groundless suggestion that the present issue was earlier decided, the carriers offer little in direct response to the important question now presented concerning working rights of senior firemen who remain in employment after the Award's expiration.[1] While conceding hard-

[1] The carriers suggest (Opposition, p. 5) that counsel for the Brotherhood conceded in the District Court that a carrier is exercising its "right under its rules as modified by the Award" when after Award expiration it forces a fireman to another job to reduce his wages. Of course there was no such concession intended or made. While Brotherhood counsel generally concurred in the quoted statement by carriers' counsel in so far as the two categories of cases were concerned, he clearly did *not* concede the central issue posed in this case, to which the District Court properly addressed its opinion (see Petition, pp. 11-14), as did the Court below.

ship to firemen, they cite (Opposition, p. 15) a National Joint Board report of January 5, 1966, finding little hardship resulting from the Award during its life. But what is presently in issue is the *post*-Award action of the carriers abolishing desirable assignments to force remaining firemen into lower paying jobs, with manifest resulting hardship which clearly was not within the compass of the Joint Board's 1966 report. It should be noted that the District Court excluded that report from evidence in this case on grounds of irrelevance (Tr., May 4, 1966, pp. 35-39). After the Award ever fewer firemen remain in service and far greater hardship results as senior men are forced into the few most inferior assignments in the seniority district. Thus, on a line with one hundred firemen working in "blankable" positions, hardship was minimal during the Award as long as most firemen remained in service; but now when only 10 or 20 firemen remain, forcing them into the least lucrative 10 or 20 positions among one hundred operating runs depresses senior firemen into assignments at the bottom of the desirability ladder. It is this circumstance which causes increasing hardship after Award expiration as the carriers force the remaining firemen into the poorest positions.[2]

Decisive in the present case is the carriers' failure to meet our basic objection—that job abolition procedures which

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[2] Disregarding the crucial consideration that Award 282 expired in 1966, the carriers repeatedly insist (see Opposition, pp. 12, 14) that their *post*-Award abolition of desirable assignments to force the remaining firemen into lower paying work is authorized by the Award itself. But Board 282 not only did not authorize any such post-Award action by the carriers, it could not have done so in view of the limits of its jurisdiction. As the carriers themselves have pointed out to this Court (*Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen*, No. 933, October Term, 1967, Petition, p. 31, n. 13): ". . . the Neutral Members were not purporting to decide what rules were to apply after the Award expired. Board 282 has disclaimed any jurisdiction to decide that issue, which involves an interpretation of the Railway Labor Act and P.L. 88-108 rather than an interpretation of the Award. Answer, on June 9, 1964, to SUNA Question No. III."

were authorized during the Award, strictly in connection with reductions in the firemen's ranks, are being used by the carriers after Award expiration when such reductions are no longer permissible for the *ultra vires* purpose of forcing remaining firemen into the least desirable jobs. What was in issue in the earlier litigation was the post-Award status of reductions effected during the Award in the ranks of the firemen. What is in issue in this case is the post-Award working rights of "protected" firemen who were not eliminated, to whom the President, the Congress, and Board 282, clearly sought to assure work and pay rights commensurate with their seniority and lifetime of honest labor. That issue is ripe and deserving of this Court's review.

Respectfully submitted,

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